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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 196 [redacted]

AIR TERMINAL SERVICES, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Air Terminal Services, Inc., respectfully prays that a writ of certiorari be issued to review a judgment of the United States Court of Claims entered April 17, 1964.

THE OPINIONS BELOW

The majority opinion of the Court of Claims and the two dissenting opinions have not yet been reported but they appear in the certified record at pages 67 through 114 and are printed in the appendix to this petition, together with the findings of fact of the Court.

JURISDICTION

The judgment of the United States Court of Claims entered April 17, 1964, is final and the jurisdiction of this Court is invoked under Section 1255 of the Federal Judicial Code (28 USCA 1255 (1)).

THE QUESTIONS PRESENTED

The facts hereinafter set forth present the following questions of law:

(1) The majority opinion of the Court of Claims has improperly extended the "sovereign act" doctrine to include rules of convenience wholly local in character.

(2) The majority opinion of the Court of Claims has improperly limited the time honored rule of law that parties to a contract impliedly warrant that neither will unilaterally hinder or make more burdensome the performance of the contract by the other.

STATEMENT OF FACTS

Petitioner is a corporation operating concessions at various airports. Respondent, acting through the Federal Aviation Agency, sent to petitioner and others an invitation to bid on the parking concession at the Washington National Airport (hereinafter called "Airport") for a three year period beginning October 1957. With this invitation respondent sent a Data Sheet which contained, inter alia, (a) existing rates charged at the concession, (b) gross receipts from the concession for a one year period, (c) the average number of cars using the concession in four different months, and (d) passenger use of the Airport in 1956 and the estimated use in 1957 an 1958. Said invitation, while not by its terms exclusive, included all of the

then paid public parking space at the Airport excepting only 62 existing metered spaces, 32 of which were located near the main Terminal building, a fact well known to petitioner. The invitation required as payment of rent for the concession a percentage of gross receipts with a guaranteed minimum rental of not less than $225,000 per year.

Primarily relying upon the prior concession income and the use of the parking lot and Airport as disclosed by the Data Sheet, together with the knowledge that the concession embraced all paid public parking areas except the 32 competing metered spaces, petitioner prepared and submitted its bid which provided for a sliding scale rental of 86.4% to 95.1% of its gross receipts together with a guaranteed annual minimum rental of $300,000 (Court's Finding of Fact #5). Respondent accepted petitioner's proposal and the contract in conformity therewith was executed as of October 6, 1957.

Wholly unknown to petitioner, respondent's representatives at the time of the issuance of the invitation for bids and at the time of the execution of the concession contract had under secret consideration various proposals for the installation of new and competing metered parking spaces. If petitioner had not be misled by respondent's failure to disclose its plans, it would have computed the resultant loss of revenue and would have adjusted downward its bid and guaranteed minimum rental as it had done in other instances when properly informed (Court's Finding of Fact #7).

In October of 1958 respondent completed the reworking of the traffic circle and road approaches to

the main Terminal building at the Airport and thereupon installed a total of 122 new metered parking spaces in direct competition with petitioner's concession. The resultant increase in respondent's meter revenue amounted to $98,000 during the last two contract years, while petitioner sustained a loss of short-term parking revenues (i.e. revenue from parkers paying the minimum charge) of $92,000 during the last two contract years. The primary and proximate cause of petitioner's loss of revenue, as found by the Court of Claims, was the installation by respondent of 122 new and competing parking spaces (Court's Finding of Fact #16).

STATUTES INVOLVED

Act of June 29, 1940, ch. 444, as added May 15, D.C. Code § 1302:

> § 7-1302. *Powers and duties of Administrator—Rules and Regulations.*
>
> The Administrator shall have control over, and responsibility for, the care, operation, maintenance, and protection of the airport, together with the power to make and amend such rules and regulations as he may deem necessary to the proper exercise thereof.

Act of June 29, 1940, ch. 444, as added May 15, 1947, 61 Stat. 94, ch. 62, 7 D.C. Code § 1305:

> § 7-1305. *Penalty for violations.*
>
> Any person who knowingly and willfully violates any rule or regulation prescribed under this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $500 or imprisoned not more than six months, or both.

REGULATIONS INVOLVED

Parking. (a) No person shall park any motor vehicle on the Airport in excess of the time limit prescribed by the Airport director for the particular parking area.

* * * *

(c) No person shall park a motor vehicle in a metered parking space without depositing in the parking meter controlling such parking space the required sum of money for the length of time stated on such meter, * * *. 14 C.F.R. § 570.27.

ARGUMENT

I

Sovereign Act Doctrine

The sovereign act doctrine was first enunciated by this Court in *Horowitz* v. *United States,* 267 U.S. 458, 69 L. ed. 736, (1925) as follows:

> "It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its *public and general* acts as a sovereign * * * Whatever acts the Government may do, be they legislative or executive, so long as they be *public and general,* cannot be deemed specifically to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." (Emphasis added)

The key descriptive words "public and general" have been properly construed as describing acts of general application such as emergency or war measures including priorities, embargoes, rationing and the like. *Schnell* v. *United States,* 166 F. 2d 479 (1948); *Clemmer Construction Co.* v. *United States,* 108 Ct. Cl.

718, 71 F. Supp. 917; *Kelly* v. *United States*, 107 Ct. Cl. 594, 69 F. Supp. 117.

Respondent contends and the majority of the court below held that the installation of 122 new metered parking spaces constituted a "parking regulation" and, hence, a "public and general act of the sovereign" for which respondent was not liable in damages.

The petitioner contends and the dissenting opinion states that this wholly unwarranted extension of the sovereign act doctrine to cover a mundane commercial act of a strictly local nature, namely, the installation of 122 parking meters "is swinging the 'sovereign act' weapon with a vengeance," and is "an attempt to bring far more under the protective umbrella of a sovereign act than can logically be brought within its appropriate shelter * * * The so-called 'parking regulation' did not rise to the dignity of a sovereign act, but sank to the level of a local rule of convenience. It was an affirmative act on the part of the Government which caused plaintiff's receipts to be reduced substantially and it turned what would have been a profitable concession into one that entailed a substantial loss. This was an act of inteference on the part of the Government which the circumstances of this case do not justify. *State of California* v. *United States*, 151 F. Supp. 570 (N.D. Cal. 1957); *Bateson-Stoltè, Inc.* v. *United States*, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959); *Sunswick Corporation* v. *United States*, 109 Ct. Cl. 772, 75 F. Supp. 221 (1948)." (Dissenting Opinion, Chief Judge Jones.)

Nor is the importance of the decision in the instant case limited to the petitioner alone:

> "Today, as the activities of Government become more complex and the Government is engaging in

wider fields of activity, the need is becoming manifest that there should be a more accurate definition of the term sovereign act and a more flexible application of its effects on day-to-day activities. As we enter the electronics and space age, the contracts with the Government will become vastly more complicated. Already the Government is necessarily spending billions on national defense involving immense contracts. The Nation's business, which was once primarily local, has become largely interstate, greater sums are being and will be spent on conservation projects, irrigation, soil and water conservation, as well as military and other development projects.

"If the contractors on these great projects are to be met at frequent trouble spots with the plea of a sovereign act as a defense against the Government's interference with their operation of public contracts, they will of necessity take these road blocks into consideration in calculating and submitting their bids. The costs to the Government will be higher, the irritations and misunderstandings will be greater and court dockets more crowded.

"It would be in the interest of all concerned if either the limits of the term could be better defined or if a more flexible approach to the old harsh doctrine could be had, especially in peacetime periods. As it is, the contractor must face the uncertainty; the lawyers for the defense must raise the defense of a sovereign act if there is any possibility of its application; the lawyers for plaintiff must continue to insist that it does not apply—thus carrying on a continuing cold war. That conflict is gradually ripening into a real battle, with the litigants charging back and forth across a no-man's land, with the courts being caught in the middle. As in most modern wars, everyone loses." (Dissenting Opinion, Chief Judge Jones.)

If the majority opinion of the court below is correct in holding that any traffic regulation, as the exercise of police power, is per se a sovereign act, then respondent could have closed the entrance to petitioner's parking lots during the hours of rush hour traffic and on weekends under the guise of alleviating traffic congestion thereby completely ruining petitioner's concession and still have collected $900,000 from petitioner under the guaranteed minimum rental.

> "The Government's immunity from the consequences of a sovereign act is a valuable and essential right. It should be invoked where and to the extent it is applicable. But it is a powerful weapon and should not be used in too wide a field or to cover inappropriate matters under the guise of necessary protection for the Government. It is fitting to say, 'O, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant.' *Measure for Measure,* Act II, Scene 2, Line 107." (Dissenting Opinion, Chief Judge Jones.)

It is therefore respectfully submitted that this Court should now define the limits of the sovereign act doctrine so that the Government as well as all those dealing with it can act with reasonable assurance within clearly defined guidelines.

II

The Doctrine of Implied Warranty

The petitioner contends that the information supplied on the Data Sheet with the invitation to bid and the requirement of a guaranteed minimum rental implied a warranty by the respondent not to compete with petitioner's parking concession. The respondent contends and the majority of the Court below held that such a warranty could not be implied since re-

spondent had the undisclosed intent to compete and hence would not have expressly warranted not to compete.

It has long been established law that there is "an implied provision of every contract whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent the performance thereof by the other party or that will hinder or delay him in its performance." *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 94 (1947); *Sunswick* v. *United States*, 109 Ct. Cl. 772, 75 F. Supp. 221; *State of California* v. *United States*, 151 F. Supp. 571.

This doctrine has heretofore been subject to one and only one limitation in its application to Government contracts. Namely, no such warranty will be implied where it is clearly impossible for the contracting Government agency to perform such a warranty. In *Bateson-Stolte, Inc.* v. *United States*, 305 F. 2d 386 (Ct. Cl. 1962), the Corps of Engineers could not warrant, expressly or impliedly, that another arm of the Government, The Atomic Energy Commission, would not exercise the sovereign power of the Government in building an atomic plant as part of the national defense effort. In *McGuire d/b/a Goose Hill Lodge* v. *United States*, 305 F. 2d 449 (Ct. Cl. 1962) the Wildlife Service of the Department of Interior could not warrant expressly or impliedly that the sovereign state of Missouri would not exercise its power to change game laws. In both of these cases the court applied an objective test and held that all who dealt with a Government agency were charged with the obvious knowledge that the agency could not warrant, expressly or impliedly, what was beyond its power to perform, namely, what

another agency of the Government or a sovereign state would or would not do in the exercise of its sovereign power.

In the instant case the Court below broadened this exception by applying a wholly subjective standard in holding that where the contracting officer would not have expressly warranted that his agency would not by its own action make more burdensome petitioner's performance, no such warranty could be implied. If this is a correct statement of the law, then any claim based upon implied warranty could be defeated by the testimony of the contracting officer that he would not have so warranted expressly. The temptation to the Government agency to utilize such a readily available and nebulous defense is immediately apparent and, since the mental processes of the contracting officer are necessarily subjective, the claimant has no valid means of meeting this defense. Respondent could have entered into the concession contract with petitioner with the undisclosed intent to open a competing parking lot charging one-half of petitioner's parking rates, completely ruin petitioner's concession and still collect from petitioner the $900,000 guaranteed minimum rental.

The practical result of the lower Court's decision is to sound the death knell of the time honored and equitable doctrine of implied warranty. This should not be countenanced and this Court should now redefine and limit the exception to the implied warranty doctrine so that it is once again a rule of reason and not a invitation to defraud.

For the reasons stated in the dissenting opinion of Chief Judge Jones quoted above, the settlement of this

question is of primary importance to all those concerned with the myriad of Government contracts now existing and to be let in the future.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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